

Diagnostic Sonographers: A Jurisprudence Review

**Health Professions Regulatory Advisory
Council (HPRAC)**



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Health Professions Regulatory
Advisory Council

Conseil consultatif de
réglementation des professions
de la santé

Diagnostic Sonographers: A Jurisprudence Review

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Objective:

This jurisprudence review explores legal cases relevant to the profession of diagnostic sonographers to support the provision of advice to the Minister of Health and Long-Term Care regarding the need for regulation of diagnostic sonographers under the *Regulated Health Professions Act, 1991*. This review was conducted between June 13, 2011 and August 10, 2011. This review was updated between March 20, 2013 and April 11, 2013.

Diagnostic sonographer was understood to mean a medical professional who has specialized education, training and skills allowing them to employ high frequency sound waves (ultrasound) to produce and analyze visual images of body organs, tissues or blood flow. There are several different terms used across Canada to describe diagnostic sonographers; this search focused solely on those that were synonymous with the meaning of diagnostic sonographer previously described.

The main focus of the review is on the legal risks associated with the profession of diagnostic sonographers and as well as the risk of harm posed to the public. Information regarding the regulatory framework for diagnostic sonographers in each Canadian province is not included in this review, as it was understood that this is the subject of a Jurisdictional Review also currently underway at HPRAC. The initial and updated searches were conducted, however, with the understanding that none of the Canadian provinces currently regulate diagnostic sonographers.

Search Methodology:

The legal services branch of the Ministry of Health and Long-Term Care searched the LexisNexis Quicklaw legal database using a variety of search terms (see Appendix B and Appendix C). Please see Appendix A for a description of the Quicklaw database. WestLaw Canada and CanLii legal databases were not searched following consultation with the Ministry of the Attorney General Law Librarian who indicated that it almost entirely overlaps with Quicklaw. Further, given that searches using the Quicklaw database provided some relevant case law there was no need to expand the search to another database.

The searches were limited to Canadian case law. Appendix B and Appendix C describe the methodology and search results in further details.

Summary of Findings:

All search results were examined to determine which cases were relevant. Upon consultation with HPRAC it was decided that Quebec judgments would not be included in this jurisprudence review and therefore, were not assessed for relevance.

The initial searches yielded 4 relevant cases. Topics relevant to risk of harm and regulation include:

- Risk of harm to patient (see *T.W. v Seo* and *R v Roos*)
- Medical malpractice claims against diagnostic sonographers (see *Mickle v Salvation Army Grace Hospital Windsor Ontario*)
- Duty of care owed by diagnostic sonographers to both mother and fetus (see *McDonald-Wright (Litigation Guardian of) v O'Herlihy*)

The updated search yielded no additional relevant cases.

Since certain cases were decided at more than one level of court, this review includes only the decision of the highest level court at which the relevant substantive issues were decided.

Title	McDonald-Wright (Litigation Guardian of) v O’Herlihy
Court	Ontario Superior Court of Justice
Citation	2005, 75 OR (3d) 261, 138 ACWS (3d) 1126 (Ont Sup Ct J)
Noted Up	Mentioned – 3
Source	Quicklaw
Search terms	Ultrasound technologist
Date Last Accessed	July 19, 2011
Relevance	Medical malpractice claim against ultrasound technologist by mother and child
Summary	<p>The plaintiff brought a medical malpractice claim against a radiologist and ultrasound technologist for the failure to detect neural tube defects of the fetus at 22 weeks gestation. The plaintiff also brought a claim on behalf of her infant son who was born with a neural tube defect. At trial, the jury concluded that there was no negligence on the part of the defendants that caused or contributed to the plaintiff’s inability to terminate her pregnancy. The issue at the Superior Court was whether all of the issues had been dealt with appropriately at the jury trial.</p> <p>The relevant part of this decision is where the court discussed the duty of care owed by ultrasound technicians and radiologists to both mother and fetus. The court explained that to succeed in a negligence claim, it must be established: 1) that the defendant owes a duty of care to the plaintiff; 2) that the defendant breached this duty of care; and 3) that this causes or contributes to the plaintiff’s loss or damage. The court held that there is a duty of care owed by the ultrasound technologist to both the mother and fetus. The court also notes that this duty is identical in both scenarios. In the context of this case the negligence questions required the jury to determine in respect of the ultrasound technologist and the radiologist if there was negligence that caused or contributed to the mother’s inability to terminate the pregnancy.</p> <p>Note: This case was appealed further to the Ontario Court of Appeal where the decision of the lower court was upheld.</p>

Title	Mickle v Salvation Army Grace Hospital Windsor Ontario
Court	Ontario Court of Justice, General Division
Citation	1998, 166 DLR (4 th) 743, 81 OTC 23 (Ont Gen Div)
Noted Up	Mentioned – 4
Source	Quicklaw
Search terms	Ultrasound technologist
Date Last Accessed	July 20, 2011
Relevance	Claim brought against diagnostic sonographer for supposed negligent ultrasound examination
Summary	<p>Plaintiff mother alleged that an ultrasound technologist and a radiologist were negligent in failing to detect and inform her of her baby's prenatal defects. As a result, the complainant claims that she was deprived of her right to choose abortion. Her child was born with congenital hemihypoplasia ichthyosis erythroderma and limb deficiencies (CHILD) syndrome.</p> <p>With respect to the duty required of the ultrasound technologist, the court stated that she was obliged to possess and use the reasonable degree of learning and skill ordinarily possessed by an ultrasound technologist in similar communities and similar cases. The court noted that in view of the fact that ultrasound technology has developed rapidly, the duty must relate to the reasonable degree of learning and skill possessed by ultrasound technologists in 1991 (the year that the ultrasound was performed).</p> <p>The plaintiff had been sent to Grace Hospital by her physician for a routine or Level 1 ultrasound. The court stated that in 1991, there were no Canadian Guidelines as to the scope of a routine ultrasound examination, so the practice in Ontario was to follow the Guidelines of the American Institute of Ultrasound Medicine (AIUM), and the Guidelines of the American College of Radiology (ACR). The ultrasound technologist gave evidence that she did not visualize all four limbs. Femur length was measure only on the left side limb. The plaintiff argued that the technologist had performed a substandard examination, and that by failing to examine all four limbs of the fetus the right side abnormalities were not detected.</p> <p>The court felt that in this type of case, the evidence of experts was necessary. The plaintiff and the defendants each called 3 radiologists who specialized in ultrasound as their witnesses, and the defendants also called an instructor of ultrasound technology. The views of the expert witnesses were directly opposite: the plaintiff's witnesses felt that the ultrasound examination performed in this case fell below the reasonable standard, and the defendant's witnesses testified that it was performed in accordance with the reasonable standard. In the end, the court chose to accept the evidence of the defence experts. The court reasoned that the plaintiff's experts had been seeking to impose the standard required for a Level 2 examination on a routine or Level 1 examination. It was clear from the evidence that the examination actually performed was a Level 1 examination and at this time the AIUM and ACR Guidelines did not require all of the limbs to be examined when performing this type of ultrasound.</p> <p>The plaintiff also argued that the hard copy films of the ultrasound were inadequate and failed to provide sufficient information to the physician for him to make a proper diagnosis. The court dismissed this claim stating that not only was there expert evidence suggesting that the harm copy films were of average quality, but also the physician was entitled to rely upon the report prepared by the ultrasound technologist</p>

	<p>regarding her observations of the real time examination.</p> <p>In conclusion, the court dismissed the action, holding that the ultrasound technologist had exercised the reasonable degree of learning and skill that was required of her.</p>
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Title	R v Roos
Court	Ontario Court of Justice, General Division
Citation	(26 November 1991) Walkerton C-10418 (Ont Ct J (Gen Div))
Noted Up	-----
Source	Ontario Court of Justice, General Division
Search terms	Ultrasound technician
Date Last Accessed	July 19, 2011
Relevance	Risk of harm to patient – sexual assault
Summary	<p>Harold Richard Roos was employed as an ultrasound technician at Kincardine District Hospital. He was accused of committing a sexual assault on one of his patients. The complainant's evidence was that she had presented herself at the hospital for an ultrasound examination. While the accused stood in the examination room with her, he instructed her to undress to the point where she only had her socks on. He then attempted to kiss her and touched her in a sexually inappropriate manner before she hurriedly got dressed and quickly left the hospital.</p> <p>The complainant submitted at trial that she followed the instructions of the technician because she had faith in him and because he was "comparable to a medical Doctor". The trial judge found the accused guilty of committing a sexual assault on the complainant.</p> <p>Note: At the Court of Appeal the judge found that there were a number of errors in the conduct of the trial, and therefore set the conviction aside and ordered a new trial.</p>

Title	T.W. v Seo
Court	Ontario Superior Court of Justice
Citation	[2003] OTC 940, 126 ACWS (3d) 271 (Ont Sup Ct J)
Noted Up	Mentioned – 3, Cited – 1
Source	Quicklaw
Search terms	Ultrasound technician
Date Last Accessed	July 19, 2011
Relevance	Risk of harm to patient – sexual misconduct & invasion of privacy
Summary	<p>Plaintiff sued an ultrasound technician and the independent clinic at which he worked for damages resulting from the actions of the technician. The ultrasound technician admitted to videotaping the plaintiff in the change room, conducting unauthorized examinations and engaging in unauthorized touching of the plaintiff. At trial, the jury found the ultrasound technician liable for battery and the clinic liable for negligence. At the Superior Court an argument was heard with respect to the issue of vicarious liability of the clinic. In the course of concluding that the clinic would be held liable for the acts of the ultrasound technician, the Superior Court addressed the inherent risks involved with ultrasound examinations:</p> <p>“63 First, by its very nature, an ultrasound examination potentially involves requiring an employee to touch a client in intimate body zones. This necessarily carries with it a need to minimize or exclude the risk of incidents of unauthorized touching by some combination of training, continuing awareness programmes and temporary supervision or checks. In other words, in this particular case, the very business of the Clinic entailed a risk of harm to the plaintiff. I do not believe, however, that this consideration by itself determines the issue of vicarious liability as suggested by the plaintiff.</p> <p>64 Second, even without the renovations, the actual manner in which the employer carried on the ultrasound clinic in the evenings increased the risk to the plaintiff. The evidence was clear that the Clinic had no procedures in place that, as a precaution, would have permitted a female patient to request the attendance of another staff member during any part of an examination. There was also no possibility of supervision by another staff member given the physical layout of the clinic nor were there any procedures in place for any spot checks on the employee's activities.</p> <p>65 Third, the nature of the relationship between the technician and patient involves a degree of power, which enhances the risk to a patient. The facts of this case amply demonstrate the extent to which this risk was present in the operations of the Clinic. A patient relies implicitly upon the professional skill and training of the technician to ensure that appropriate tests are conducted skillfully. In conducting its operations, the Clinic further enhanced this risk by permitting Seo to dress in a manner that suggested to clients he was a medical doctor. In this case, the plaintiff willingly submitted to an additional pelvic ultrasound when Seo raised the possibility of cysts on her ovaries because she assumed he was a doctor. In addition, she allowed the test to be repeated several times and permitted Seo to touch her in the course of these examinations because she thought Seo was a medical doctor and relied upon his judgment.</p> <p>66 Fourth, related to the issue of power is the vulnerability of many clients of the Clinic. Because many clients are worried about possible health problems that have resulted in the need for an ultrasound examination, they appear at a clinic in a vulnerable state. In these circumstances, the degree of power exercised by a technician is enhanced, particularly in circumstances in which the client believes the</p>

	<p>technician to be a medical doctor. The result is an increased risk that a technician will engage in unauthorized acts of touching believing the patient will not question his actions. Conversely, as in the present case, there is also an increased risk that the patient will accept such acts as a necessary part of the procedure, or will consent to additional tests, believing the technician is addressing legitimate medical concerns.”</p>
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Appendix A: Description of Databases

LexisNexis Quicklaw¹

LexisNexis Quicklaw offers access to a collection of databases including case law from all Canadian jurisdictions, administrative tribunal decisions, legislation and legal commentary in the form of texts, journals, newsletter and indexes. In addition to Canadian materials, LexisNexis Quicklaw includes American case law and legislation and selected U.K. and Commonwealth judgments. Decisions are in the form of digests or full text. They may be either electronic versions of printed reports (e.g., Ontario Reports) or unreported current judgments² as received directly from the courts.³

¹ http://rc.lsuc.on.ca/library/research_databases.htm

² Unreported full text judgments from Canadian courts can be accessed through the "All Canadian Court Cases" group source. (Quicklaw Source Information)

³ http://rc.lsuc.on.ca/library/research_databases.htm

Appendix B: Initial Search Results

Quicklaw Search Results

Quicklaw was searched using the “All Canadian Court and Tribunal Case Law” feature, which contains all available reported and unreported full text judgments from Canadian courts and tribunals as well as LexisNexis case law summaries. The following table summarizes the search terms used and the number of results each term yielded:

Table 1. Quicklaw search results Canada

Date of Most Recent Search (DD/MM/YYYY)	Phrase Searched	Total Hits	Total Relevant Hits
13/06/2011 – 10/08/2011	“diagnostic sonograph!”	10	0
13/06/2011 – 10/08/2011	“ultrasound technician”	48	2
13/06/2011 – 10/08/2011	“ultrasound technologist”	106	2
13/06/2011 – 10/08/2011	“diagnostic medical sonograph!”	17	0
13/06/2011 – 10/08/2011	“diagnostic imaging technologist”	9	0
13/06/2011 – 10/08/2011	“diagnostic imaging technician”	3	0
13/06/2011 – 10/08/2011	“ultrasonograph!”	66	0
13/06/2011 – 10/08/2011	“sonograph!”	99	0
13/06/2011 – 10/08/2011	“diagnostic ultrasound”	45	0
13/06/2011 – 10/08/2011	“3-D ultrasound”	1	0
13/06/2011 – 10/08/2011	“transvaginal and ultrasound”	5	0
13/06/2011 – 10/08/2011	“transrectal and ultrasound”	3	0
13/06/2011 – 10/08/2011	“Intracavitary ultrasound”	0	0
13/06/2011 – 10/08/2011	“failure /8 ultrasound”	19	0
13/06/2011 – 10/08/2011	“ultrasound /s harm”	3	0
13/06/2011 – 10/08/2011	“ultrasound /s risk”	36	0

Appendix C: Updated Search Results

Quicklaw Search Results

Quicklaw was searched using the “All Canadian Court and Tribunal Case Law” feature, which contains all available reported and unreported full text judgements from Canadian courts and tribunals as well as LexisNexis case law summaries from August 10, 2013 to the date of the most recent search. The following table summarizes the search terms used and the number of results each term yielded.

Table 2. Quicklaw search results Canada

Date of Most Recent Search (DD/MM/YYYY)	Phrase Searched	Total Hits	Total Relevant Hits
26/03/2013 – 11/04/2013	“diagnostic sonograph!”	0	0
26/03/2013 – 11/04/2013	“ultrasound technician”	2	0
26/03/2013 – 11/04/2013	“ultrasound technologist” not “ultrasound technician”	2	0
26/03/2013 – 11/04/2013	“diagnostic medical sonograph!”	1	0
26/03/2013 – 11/04/2013	“diagnostic imaging technologist”	0	0
26/03/2013 – 11/04/2013	“diagnostic imaging technician”	1	0
26/03/2013 – 11/04/2013	“ultrasonograph!”	3	0
26/03/2013 – 11/04/2013	“sonograph!”	9	0
26/03/2013 – 11/04/2013	“diagnostic ultrasound”	7	0
26/03/2013 – 11/04/2013	“3-D ultrasound”	0	0
26/03/2013 – 11/04/2013	“transvaginal and ultrasound”	0	0
26/03/2013 – 11/04/2013	“transrectal and ultrasound”	0	0
26/03/2013 – 11/04/2013	“Intracavitary ultrasound”	0	0
26/03/2013 – 11/04/2013	“failure /8 ultrasound”	4	0
26/03/2013 – 11/04/2013	“ultrasound /s harm”	0	0
26/03/2013 – 11/04/2013	“ultrasound /s risk”	1	0

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